(3) (4) (4)

Nos. 87-1614, 87-1639 and 87-1668

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN W. MARTIN, ET AL., PETITIONERS

v.

ROBERT K. WILKS, ET AL.

PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA, ET AL., PETITIONERS

v.

ROBERT K. WILKS, ET AL.

RICHARD ARRINGTON, JR., ET AL., PETITIONERS

v.

ROBERT K. WILKS, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether individuals who were neither parties to nor intervenors in a Title VII suit may be barred from challenging employment-related actions taken under consent decrees entered in that litigation.

2. Whether the court of appeals properly instructed the district court on remand to evaluate the consent decrees under the standards articulated in *Johnson* v. *Transportation Agency*, No. 85-1129 (Mar. 25, 1987).

3. Whether consent decrees and voluntary affirmative action plans should be evaluated differently for purposes of Title VII and the Equal Protection Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-24a) is reported at 833 F.2d 1492. The district court's initial findings of fact and conclusions of law (Pet. App.

27a-66a) are reported at 39 Fair Empl. Prac. Cas. (BNA) 1431. The district court's additional findings of fact (Pet. App. 69a-76a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1987. Timely petitions for rehearing were denied on January 25, 1988 (Pet. App. 25a). The petition for a writ of certiorari in No. 87-1614 was filed on March 30, 1988; the petition for a writ of certiorari in No. 87-1639 was filed on April 1, 1988; and the petition for a writ of certiorari in No. 87-1668 was docketed as of March 31, 1988. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In January 1974, the Ensley Branch of the National Association for the Advancement of Colored People and seven black individuals filed separate class action complaints in the United States District Court for the Northern District of Alabama against the City of Birmingham (City), the Personnel Board of Jefferson County, Alabama (Board), and other local government officials (Pet. App. 3a-4a). The complaints alleged that the City and Board had engaged in racially discriminatory hiring and promotion practices in various public service jobs, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and 42 U.S.C. 1981 and 1983 (Pet. App. 4a & n.3). In May 1975, the United States filed a similar complaint against the City and Board, alleging a pattern of discriminatory hiring practices against blacks and women (*ibid.*).

The district court consolidated the three cases and held a bench trial in December 1976 limited to the issue of the

validity of police and firefighter entry-level tests used by the City and the Board. In January 1977, the court found that the tests adversely affected black applicants and were not sufficiently job-related and thus held that the tests were discriminatory in violation of Title VII (Pet. App. 4a). See *Ensley Branch of the NAACP* v. *Seibels*, 13 Empl. Prac. Dec. (CCH) ¶ 11,504 (N.D. Ala. 1977), aff'd, 616 F.2d 812 (5th Cir.), cert. denied, 449 U.S. 1061 (1980).

In August 1979, the district court held a second trial concerning the validity of other testing and screening devices used by the Board. Before the court issued its decision, however, the parties entered into ultimately fruitful settlement negotiations. Pet. App. 4a-5a. In June 1981 the plaintiffs and the United States jointly entered into two consent decrees—one with the City (Pet. App. 122a-201a), and one with the Board (*id.* at 202a-235a). Although containing no admissions or adjudications of liability, the decrees provided "an extensive remedial scheme, including long-term and interim annual goals for the hiring of blacks as firefighters and the promotion of blacks to the position of fire lieutenant" (*id.* at 5a (footnote omitted)). Paragraph 2 of the decree with the City made clear, however, that (Pet. App. 124a)

> [n]othing herein shall be interpreted as requiring the City to * * * promote a less qualified person, in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure.

2. After entering an order provisionally approving the decrees, the district court, on August 3, 1981, held a fairness hearing to consider objections of interested nonparties (Pet. App. 238a). The Birmingham Firefighters Association 117 (BFA), among others, appeared and filed objections as amicus curiae. After the hearing but before

final approval of the decrees, the BFA and two of its members moved to intervene as of right in each of the three original actions, contending that the proposed decrees would adversely affect their rights. Pet. App. 5a-6a. On August 21, 1981, the district court entered an order approving the consent decrees and denying the motions to intervene as untimely (*id.* at 236a-249a). See *United States* v. *Jefferson County*, 28 Fair Empl. Prac. Cas. (BNA) 1834 (N.D. Ala. 1981), aff'd, 720 F.2d 1511 (11th Cir. 1983).

3. After entry of the district court's order, seven white firefighters filed a complaint in the district court against the City and the Board. See Pet. App. 110a-121a. The complaint alleged that enforcement of the consent decrees would discriminate against them in violation of Title VII; the complaint sought a preliminary injunction. The district court denied the request for injunctive relief. Pet. App. 6a.

The court of appeals affirmed. *United States* v. *Jefferson County*, 720 F.2d 1511 (11th Cir. 1983).[1] The court held that the white firefighters were not entitled to injunctive relief because of their inadequate showing of irreparable harm (*id.* at 1519-1520). The court also dismissed the firefighters' appeal from the denial of intervention, holding that the district court had not abused its discretion, in part because the firefighters could "institut[e] an independent Title VII suit, asserting the specific violations of their rights" (*id.* at 1518).[2]

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[1] The appeal from the district court's order denying injunctive relief was consolidated with the appeal from the court's order denying intervention (Pet. App. 7a).

[2] In the court of appeals, the United States contended that the motions to intervene were untimely, prejudicial to the parties, and improper under Fed. R. Civ. P. 24(a). See Brief for the United States at 14-26, *United States* v. *Jefferson County*, 720 F.2d 1511 (11th Cir. 1983).

4. After unsuccessfully seeking preliminary injunctive relief, the firefighters pursued their complaint in the district court against the City and the Board. A second group of white firefighters, the *Wilks* respondents, filed a similar complaint against the City and the Board. Pet. App. 7a; see *Wilks* v. *Arrington*, No. CV83-AR-2116-S (N.D. Ala.) (R. 17-1). The complaint alleged that the City and the Board had denied promotions to the white firefighters in favor of certain less qualified black firefighters, in violation of Title VII and the Equal Protection Clause; the complaint further sought to enjoin the City from making those promotions. Pet. App. 7a. Several other city employees who had been denied promotions also filed similar complaints against the City and the Board. In addition, the United States brought suit against the City and the Board, alleging that the City's practice of promoting blacks over demonstrably better qualified white violated, inter alia, Title VII and the Equal Protection Clause. Pet. App. 8a.[3] In April 1984, the district court consolidated the actions under the caption "In re

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[3] The United States, as a signatory to the consent decrees, was originally named as a defendant in two of the "reverse discrimination" actions, as the District Court called them. The district court later granted the United States' motion to intervene as party-plaintiff in the remaining cases. The court also granted the United States' motion to realign itself as plaintiff in the two suits in which it had been named as a defendant. Pet. App. 8a & n.10.

The *Martin* petitioners, as the plaintiffs in the original 1974 action and signatories to the consent decrees, moved both in their individual capacities and as class representatives to intervene as parties-defendant in several suits. The district court permitted the *Martin* petitioners to intervene only in their individual capacities. Pet. App. 9a & n.12.

Birmingham Reverse Discrimination Employment Litigation" (*id.* at 9a).

After a trial in December 1985 concerning only the promotion of blacks in the City's Fire and Engineering Departments, the district court granted the Board's motion to dismiss (Pet. App. 11a, 27a-66a). The court concluded that "[the] plaintiffs cannot collaterally attack the [consent] [d]ecree's validity" (*id.* at 61a), and focused its attention on the City's compliance with paragraph 2 of the consent decree (see page 3, *supra*). The court further held that the *Wilks* respondents and the United States were bound by the consent decrees and concluded that there had been no showing that the City's promotion practices violated paragraph 2 (Pet. App. 10a-11a).

5. On appeals by the *Wilks* respondents, who included one white employee of the City's Engineering Department, and the United States, a divided panel of the court of appeals reversed.[4] The court held that "[b]ecause * * * [the *Wilks* respondents] were neither parties nor privies to the consent decrees, * * * their independent claims of unlawful discrimination are not precluded" (Pet. App. 12a-13a). The court explicitly rejected the "doctrine of 'impermissible collateral attack' " (*id.* at 13a) espoused by other courts of appeals to "immuniz[e] parties to a consent decree from charges of discrimination by nonparties, provided the alleged discriminatory acts were taken pursuant to the consent decree" (*ibid.*). See, *e.g.*, *Dennison* v. *City of Los Angeles Dep't of Water & Power*, 658 F.2d 694 (9th Cir. 1981). The court stated that "[t]he policy of encouraging voluntary affirmative action plans," a rationale for the

[4] The court of appeals affirmed the district court's dismissal of the United States' claims, holding that "the United States is estopped from collaterally attacking the consent decrees because it is a party to them" (Pet. App. 20a). The United States has not sought review of this ruling.

doctrine against collateral attacks, "must yield to the policy against requiring third parties to submit to bargains in which their interests were either ignored or sacrificed" (Pet. App. 14a).[5]

In remanding for trial the *Wilks* respondents' claims under Title VII and the Equal Protection Clause, the court of appeals instructed the district court (Pet. App. 19a) "to evaluate the defendant's justification for the challenged promotions under the standards articulated in" *Johnson* v. *Transportation Agency*, No. 85-1129 (Mar. 25, 1987). The court further instructed the district court to review the consent decrees with the "heightened scrutiny" (Pet. App. 20a) required by *Johnson*. See *Johnson* v. *Transportation Agency*, slip op. 19-20 (inquiry whether affirmative action plan "unnecessarily trammeled" rights of nonminority employees).

ARGUMENT

Petitioners raise a common issue of substantial importance: whether individuals who were neither parties to nor intervenors in an ongoing Title VII suit may be barred from challenging employment-related actions taken under consent decrees entered in that litigation (87-1614 Pet. 11-14; 87-1639 Pet. 5-7; 87-1668 Pet. 5-9). Moreover, the court of appeals' decision conflicts squarely with a decision of the Second Circuit, which earlier this Term was affirmed by an equally divided Court. *Marino* v. *Ortiz*, No. 86-1415 (Jan. 13, 1988) (per curiam), aff'g by an equally

[5] Judge Anderson dissented, stating that "the appropriate resolution of this case would distinguish between the individual plaintiffs' claim for back pay and their claim for prospective relief" (Pet. App. 22a). Judge Anderson contended that the City should not be liable for back pay (*id.* at 22a-24a). He agreed substantially with the majority, however, that the "plaintiffs are not bound by the consent decree and should be free on remand to challenge the consent decree *prospectively* and test its validity" (*id.* at 24a (emphasis added)).

divided Court, 806 F.2d 1144 (1986). Although the decision below is correct, we agree with petitioners that this Court should grant certiorari to resolve this important and recurring issue in Title VII litigation. The other issues raised by petitioners, however, clearly do not warrant this Court's review. Accordingly, the United States urges this Court to grant certiorari limited to the first question presented in each petition.

1. Last Term, this Court granted certiorari in *Marino* to consider the issue common to these petitions, namely, "whether a District Court may dismiss as an impermissible collateral attack a lawsuit challenging a consent decree by nonparties to the underlying litigation" (slip op. 2).[6] In *Marino*, the Second Circuit barred a collateral attack on a Title VII consent decree by a group of white police officers, suggesting that the "proper course * * * would have been to intervene in the lawsuit from which the consent decree issued" (806 F.2d at 1146).[7] This Court, however, was "equally divided" (slip op. 2) and therefore affirmed the court of appeals' judgment. This case offers this Court an opportunity to address the significant issue left unresolved by *Marino*, an issue that continues to divide the courts of appeals.[8]

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[6] The United States filed a brief as amicus curiae in *Marino*, and is serving a copy of that brief on all parties to the instant proceedings.

[7] In *Marino*, the white police officers had chosen not to intervene in the original lawsuit either to challenge the proposed consent decree or to appeal the district court's approval of the decree (806 F.2d at 1146-1147; slip op. 2).

[8] Apart from the Second Circuit, the Fifth, Sixth, and Ninth Circuits have held that collateral attacks on consent decrees entered in Title VII actions are prohibited. See *Thaggard* v. *City of Jackson*, 687 F.2d 66 (5th Cir. 1982), cert. denied, 464 U.S. 900 (1983); *Stotts* v. *Memphis Fire Dep't*, 679 F.2d 541 (6th Cir. 1982), rev'd on other grounds *sub nom. Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561 (1984); *Dennison* v. *City of Los Angeles Dep't of Water & Power*, 658 F.2d 694 (9th Cir. 1981). These decisions, however, predate *Firefighters* v. *City of Cleveland*, No. 84-1999 (July 2, 1986), where this Court stated, in analogous circumstances, that "the fact that the parties have consented to the relief contained in a decree does not render their action immune from attack on the ground that it violates * * * Title VII or the Fourteenth Amendment" (slip op. 23). The courts of appeals that have barred collateral attacks thus might well reconsider the vitality of the doctrine in light of *Firefighters*.

The conflict clearly exists between the decision below and that of the Second Circuit in *Marino*, both of which were issued after *Firefighters*. Moreover, the Seventh Circuit has recently suggested that it would follow the Eleventh Circuit and permit collateral attacks on consent decrees. See *Dunn* v. *Carey*, 808 F.2d 555, 559-560 (7th Cir. 1986). The instant case squarely presents this Court with the occasion to resolve this apparently growing conflict.

Moreover, this case presents in stark fashion the dilemma that often confronts litigants in circuits which adhere to the so-called "impermissible collateral attack" rule. The *Wilks* respondents, unlike the petitioners in *Marino*, were members of, and represented by, an organization that had sought to intervene in the underlying litigation before approval of the consent decrees. They filed this separate action only after the district court denied their organization's motion to intervene. Pet. App. 5a-6a; 87-1614 Pet. 13 n.12. Under the circumstances, application of the majority rule would have denied the *Wilks* respondents " '[their] own day in court.' "[9] Indeed, the Chief Justice has criticized the rule for that reason:

> I find myself at a loss to understand the origins of the doctrine of "collateral attack" employed by the lower courts in this case to preclude a suit by parties who had no connection with the prior litigation. * * *
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> * * * * *

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[9] *Ashley* v. *City of Jackson*, 464 U.S. 900, 902 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from the denial of certiorari) (quoting 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4449, at 417 (1st ed. 1981)).

> Nonparties have an independent right to an adjudication of their claim that a defendant's conduct is unlawful.

Ashley v. *City of Jackson*, 464 U.S. 900, 901-902 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from the denial of certiorari); see *Corley* v. *Jackson Police Dep't*, 755 F.2d 1207, 1210 (5th Cir. 1985) (suggesting reexamination of rule).

The rule barring collateral attacks on consent decrees has vexed Title VII litigants and continues to divide the courts of appeals. The petitions present this Court with an occasion to resolve the conflict among the courts of appeals and provide valuable guidance to litigants in this important area of federal law. The United States thus joins petitioners in urging this Court to grant certiorari to review that aspect of the court of appeals' judgment concerning collateral attacks on consent decrees.

2. The *Martin* petitioners also contend (87-1614 Pet. 14-20) that the court of appeals' instructions on remand misapply this Court's "standards for evaluating the lawfulness of race-conscious relief under Title VII" (*id.* at 15). This contention is wrong. The court of appeals correctly instructed the district court to apply the factors this Court articulated in *Johnson* v. *Transportation Agency*, No. 85-1129 (Mar. 25, 1987), and *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979). See Pet. App. 17a-20a. Contrary to petitioners' suggestion (87-1614 Pet. 18-20), the court of appeals' instruction to "subject the consent decrees to heightened scrutiny" (Pet. App. 20a) does not conflict with *Johnson*. The court of appeals merely reacted to the district court's interpretation of the consent decrees that permitted "the City to make race conscious promotions without using *any* job-related selection procedure" (*ibid.* (emphasis in original)). Where "the natural potential [of] such an arrangement [would] trammel the interests of nonminority employees" (*ibid.*), the court of

appeals quite properly reminded the district court to consider whether the consent decrees "unnecessarily trammeled" plaintiffs' rights. *Johnson*, slip op. 19.[10] In sum, this aspect of the court of appeals' judgment merits no further review.

3. The *Personnel Board of Jefferson County, Alabama* petitioners apparently contend (87-1639 Pet. 7-9) that the court of appeals erred in refusing to acknowledge the differences between consent decrees and voluntary affirmative action plans for purposes of Title VII and the Equal Protection Clause. Petitioners do not cite any authority supporting the proposition that consent decrees and voluntary affirmative action plans should be evaluated under different criteria. This Court, recognizing that "the voluntary nature of a consent decree is its most fundamental characteristic," has suggested, however, that these two remedial devices should be reviewed under similar criteria. *Firefighters* v. *Cleveland*, No. 84-1999 (July 2, 1986), slip op. 19; see *id.* at 15 ("[T]here is no reason to think that voluntary, race-conscious affirmative action such as was held permissible in *Weber* is rendered impermissible by Title VII simply because it is incorporated into a consent decree.").[11] This aspect of the court of appeals' judgment

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[10] The *Martin* petitioners' effort to have this Court effectively determine whether the City's promotion practices violate Title VII is premature. As the court of appeals concluded, the district court has not yet considered the *Wilks* respondents' claims under Title VII and the Equal Protection Clause because of the court's focusing on whether the City and Board violated the consent decrees (Pet. App. 12a). This case, in its current posture, does not present this Court with an occasion to review the legality of the City's actions.

[11] See also *Johnson* v. *Transportation Agency*, *supra* (analysis of voluntary affirmative action plan under Title VII); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (analysis of voluntary affirmative action plan under the Equal Protection Clause).

does not warrant this Court's review.[12]

CONCLUSION

The petitions for a writ of certiorari should be granted, limited to the first question presented in each petition.

Respectfully submitted.

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MAY 1988

[12] The *Arrington* petitoners' request for this Court to grant certiorari to decide "the proper scope of the collateral lawsuit" (87-1668 Pet. 9) is premature. Until the district court hears the *Wilks* respondents' collateral lawsuit against the City, this case does not present this Court with an occasion to consider the contours of such an action.

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